

**FILE COPY**

Supreme Court, U. S.  
**FILED**

**JUL 30 1973**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

**No. 70-73**

**MARVIN MILLER,**

*Appellant,*

—v.—

**PEOPLE OF THE STATE OF CALIFORNIA,**

*Appellee.*

ON APPEAL FROM THE APPELLATE DEPARTMENT,  
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION  
AND THE AMERICAN CIVIL LIBERTIES UNION OF  
SOUTHERN CALIFORNIA, *AMICI CURIAE*, IN  
SUPPORT OF PETITION FOR REHEARING**

**MELVIN L. WULF**

**JOEL M. GORA**

American Civil Liberties Union  
22 East 40th Street  
New York, New York 10016

**A. L. WIRIN**

**FRED OKRAND**

American Civil Liberties Union  
of Southern California  
323 West Fifth Street  
Los Angeles, California 90013

*Attorneys for Amici Curiae*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

No. 70-73

---

MARVIN MILLER,

*Appellant,*

—v.—

PEOPLE OF THE STATE OF CALIFORNIA,

*Appellee.*

---

ON APPEAL FROM THE APPELLATE DEPARTMENT,  
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

---

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION  
AND THE AMERICAN CIVIL LIBERTIES UNION OF  
SOUTHERN CALIFORNIA, *AMICI CURIAE*, IN  
SUPPORT OF PETITION FOR REHEARING**

---

**Interest of *Amici*\***

The American Civil Liberties Union is a nationwide non-partisan organization of over 180,000 members engaged solely in the defense of those principles embodied in the Bill of Rights. The American Civil Liberties Union of Southern California is an affiliate of the American Civil

---

\* Burton Marks, counsel for the Appellant, and Michael R. Capizzi, Assistant District Attorney of Orange County, counsel for the Appellee have each orally granted consent to the filing of this brief. Letters embodying such consent will be transmitted to the Clerk as soon as they have been received.

Liberties Union and functions within Southern California where this case arose. During its fifty-three year existence, the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press. While our original concern was with direct governmental efforts to restrict political expression, it has been our experience that when any form of speech or writing, such as "obscenity," is declared beyond the bounds of constitutional protection, such exceptions invariably and inevitably are employed to suppress political expression.

We participated in the earlier proceedings in this case, filing a brief in support of Appellant's contentions. We also filed briefs with regard to the constitutionality of the federal statutes involved in *United States v. 12 200-Ft. Reels*, No. 70-2 and *U. S. v. Orito*, No. 70-69. In those briefs, filed almost two years ago, we presented our views concerning appropriate areas and methods of governmental regulation of obscenity, premised upon our analysis of the Court's precedents in this area. In its five decisions on June 21, 1973, a majority of the Court rejected those contentions and held, instead, that obscene material may be systematically controlled and regulated by all levels of government. We think those rulings are wrong and urge the Court to reconsider them.<sup>1</sup>

But equally important, we are concerned about the effect of those rulings on expression which does not fall into the category of "hard-core pornography." The pressures toward general censorship of disagreeable and dissident expression are hydraulic under the best of circumstances.

---

<sup>1</sup> Criticism of the premises of the Court's rulings is contained in other briefs *amici curiae* filed in support of the petition for rehearing in *Kaplan v. California*, No. 71-1422.

The Court's decisions, with their generalized deference to local powers over obscenity, will provide additional fuel for those forces. In our earlier briefs, we did not emphasize these problems, but it is now clear that the Court's decisions will exacerbate them. Accordingly, our purpose in filing this brief is to identify recent examples of this more generalized variety of censorship and suggest how the Court's decisions will worsen the situation.

## ARGUMENT

**The Court's decisions will encourage the general pressures toward censorship in American life.**

In its decisions, the Court dealt with the use of obscenity laws to prohibit or regulate the dissemination of "hard-core pornography." In *Miller v. California*, No. 70-73, the Court announced a new definition of obscenity, including as one of three elements of the new test, that the material "lacks serious literary, artistic, political, or scientific value." And in determining whether any form of expression comes within the definition, the varying "tastes and attitudes" in local communities are to be consulted and relied upon. In *Paris Adult Theatre v. Slayton*, No. 71-1051, the Court held that, outside the precincts of the home, obscenity is without substantive constitutional protection, and its communication may be banned virtually at will.

As has been documented in other briefs filed in connection with the rehearing applications in these cases, in the few short weeks since the Court's decisions were announced, there has been a wave of censorship sweeping across portions of this country, encompassing material

admittedly with a sexual content but which in no way could be characterized as "hard-core pornography."<sup>2</sup>

This spasm of censorship of sexually oriented material is, of course, extremely troubling. What troubles us even more, however, is that the censors will not be content to harass vendors of publications such as Playboy magazine, and let it go at that. Their agenda will most certainly include, as it has in the recent past, material whose sexual content is incidental or ancillary to the primary purpose of expressing views which are dissident, satirical, irreverent, profane, or sacrilegious. The presence of sexual content will be used as the pretext for suppressing works because of the ideas they contain, ideas completely divorced from the pornographic. This is not surprising, because

---

<sup>2</sup> The publishers of Playboy Magazine have supplied to *amici curiae* incident reports submitted by retailers and wholesalers of Playboy, Oui, Penthouse and similar publications. Those reports demonstrate two distinct patterns resulting from the Court's rulings: (1) harassment by public officials and (2) self-censorship by distributors.

Thus, for example, in Ashland, Ohio, the owners of a candy store were arrested and ten boxes of magazines, including Playboy, were seized. In Greenville, Mississippi, Playboy and similar magazines were confiscated from a supermarket and the distributors were threatened with a fine. In Macon, Georgia, magazines similar to Playboy were confiscated and court proceedings were commenced. In Shreveport and Jackson, Mississippi, public officials ordered such magazines off the newsstands. Similar orders were given to newsstand owners in Hopeville, Virginia, Steubenville, Ohio, and Atlanta, Georgia.

Far worse than these episodes of official harassment are instances of self-censorship where distributors have unilaterally determined to discontinue handling such magazines. For example, in Southern California, a major supermarket chain has stopped selling Playboy. The same thing has occurred in Boise, Idaho. A major drug store chain in Baltimore, Maryland has taken similar action. And in Cleveland, Ohio, the operators of a chain of drug stores have asked to see advance copies of each issue so that they can decide whether to sell Playboy in their various stores.

laws against obscenity have always had another purpose, beyond the interdiction of pornography, namely the suppression of political communication.

Indeed, this Court is familiar with recent examples of that phenomenon.

In *Kois v. Wisconsin*, 408 U.S. 229 (1972) (per curiam), the petitioner, the publisher of an underground newspaper called "Kaleidoscope," was convicted under a state obscenity statute and sentenced to two years in prison. The crimes involved were publishing two photographs of a nude couple embracing, and publishing a "Sex Poem." This Court granted certiorari, determined that the items were not obscene, and reversed the convictions. How would that case have been decided under the new standards? Equally important, will this Court be able to review all such convictions to assure that its recent decisions are applied only to hard-core pornography?

In *Dyson v. Stein*, 401 U.S. 200 (1971), police raids were directed at the publisher of Dallas Notes, another underground newspaper, effectively putting it out of business. The predicate for the raids was a search warrant authorizing the seizure of "obscene articles and materials." Will the Court's obscenity rulings deter such practices or encourage them?

In *Papish v. University of Missouri Board of Curators*, — U.S. —, 41 U.S. Law Week 3496 (March 19, 1973), the petitioner had been expelled from a state university for distributing a newspaper containing "forms of indecent speech," particularly a cartoon depicting a rape of the Statue of Liberty by police, and a headline containing a well-known "twelve-letter" word. The District Court held

that the two items were obscene; the Eighth Circuit affirmed on the theory that the petitioner could be expelled regardless of whether the items were obscene. A majority of this Court held that the cartoon and headline could not be found obscene. There were two dissents, both premised on the concept that university power to suppress "obscene and infantile" expression was greater than state power to prosecute for distribution of the same material. If the petitioner distributed the identical newspaper today, on or off the campus, is it clear that punishment or prosecution could not validly go forward under the Court's recent rulings?

Indeed, on many campuses school officials have consistently attempted to invoke obscenity rules to punish faculty or students for distributing or seeking access to materials which in no legitimate way could be characterized as "obscene." For example, in New York, school officials removed from a school library a book describing ghetto life, entitled "Down These Mean Streets," in part because of complaints that it contained "obscenities and explicit sexual interludes." *Pres. Council, Dist. 25 v. Community School Board, District 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, — U.S. —, 41 U.S. Law Week 3251 (1972). In Ohio, one school district banned "Catch 22" by Joseph Heller and "Cat's Cradle" by Kurt Vonnegut, Jr.; another razored out pages from the "Spoon River Anthology." In Alabama, a teacher was dismissed for assigning another Vonnegut story, "Welcome to the Monkey House," in part because it advocated "free sex." Litigation was necessary to declare that the work was not obscene and secure the teacher's reinstatement. *Parducci v. Rutland*, 316 F. Supp. 352 (M.D.Ala.

1970). Such examples are merely illustrative. In all of them, the existence of any sexual content at all provided the major premise for the censor's actions.

Similar problems have occurred off the campus as well. In numerous cities, distributors of underground newspapers containing political criticism and satire have been subjected to arrests and harassment, usually because the publications contained some sexual material claimed by police to be obscene. See, e.g., *Washington Free Community v. State's Attorney*, 300 F. Supp. 487 (D.Md. 1969); *Great Speckled Bird of Atlanta v. Stynchcombe*, 298 F. Supp. 1291 (N.D.Ga. 1970). In various cities, the producers of "Hair," an award-winning musical that successfully ran on Broadway for years, have had to go to court to secure the right to perform their satirical show because it contained brief episodes of nudity. See *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D.Ga. 1971) (and cases cited therein).

And so it goes. The common element in all these cases is the use of obscenity statutes as a vehicle for attempts to suppress political or social commentary. This process occurred during the regime of *Redrup v. New York*, 386 U.S. 767 (1967), when very little was thought validly to come within the reach of obscenity laws. The effect of this Court's recent rulings—particularly the reference to local standards of taste in such matters—can only be to accelerate this process. Such considerations of the effects of obscenity laws on material far removed from "hard core" sexual content, appear not to have been brought to the

attention of the Court in any systematic way. For these reasons alone, we submit that rehearing in these cases is necessary.

Respectfully submitted,

MELVIN L. WULF

JOEL M. GORA

American Civil Liberties Union  
22 East 40th Street  
New York, New York 10016

A. L. WIRIN

FRED OKRAND

American Civil Liberties Union  
of Southern California  
323 West Fifth Street  
Los Angeles, California 90013

*Attorneys for Amici Curiae*

July, 1973